

the arrears remaining unpaid when in fact there is no discretion to refuse to take such action once a defendant has been ordered, under a 16A(4) of the Act, to pay the arrears by the court.

The magistrate who dealt with the matter under appeal has gone on transfer and I therefore remit the matter to whoever is the presiding magistrate of the court to exercise his discretion, within the ambit of the provisions of s 283 of the CPC, whether to grant another period of extension within which the defendant company may pay the unsettled amount by instalments or to issue a warrant for the levy of the amount by distress and sale after due enquiry of all relevant circumstances.

Appeal allowed in part.

Solicitors: *Syarikat Choe.*

Reported by *Mathavan Devadas*

Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah

HIGH COURT (KUANTAN) — SUIT NO 23-65-86
LAMIN J
8 JANUARY 1991

Land Law — Remedies — Land charged to plaintiff — Default in payment — Foreclosure proceedings pending in land office — Civil suit against defendant — Personal liability — Whether plaintiff entitled to proceed with civil suit before first realizing security — Whether plaintiff entitled to proceed concurrently on all remedies — National Land Code 1965, s 260

Land Law — Foreclosure — Foreclosure proceedings pending in land office — Civil suit instituted — Whether civil suit should proceed before security is realized under the charge

This was an application by the plaintiff bank for the decision of this court on the following questions: 'whether the plaintiff being also the chargee of property comprised under HS(M) 13399 lot 3134/29 in the mukim of Kuala Kuantan ('the said land') was entitled at law and in equity to proceed by way of a civil suit before first realizing the security under the charge and if so, whether the plaintiff was entitled to proceed concurrently on all its remedies.'

The plaintiff bank had granted a housing loan to the defendant on the security of the said land which was charged to the plaintiff bank. The outstanding amount due as at 9 May 1986 to the plaintiff on the said facility for which a claim was being made was \$290,873.56. To realize the money owing, the plaintiff applied for an order for sale of the said land and the Kuantan Land Office had granted the application but had yet to fix the date of auction. The plaintiff also filed a writ of summons in this court claiming the amount due.

The plaintiff's counsel maintained that the question as posed to this court must be answered in the affirmative in that both the foreclosure proceedings and the civil suit could concurrently be pursued.

A **Held**, answering the question in the negative:

(1) The court found that if the amount realized by the chargee on the sale of the charged land was less than the amount due to the chargee, the chargor shall pay to the chargee the difference between the amount due and the amount so realized. So the personal liability of the chargor was only to the extent of the balance of the amount due (cl 8). Upon reading the charge annexure as a whole, both the chargee and chargor were bound by the terms and conditions of the charge and to realize the amount owing, the land must be sold in accordance with the provisions of the National Land Code 1965. If the amount realized from the sale was not sufficient to cover the amount due then it was implied that a separate action may be taken against the debtor/chargor to recover the balance should he fail to pay the difference.

C (2) There was no written guarantee involved in the present case. The only form of agreement or covenant agreed by both parties was the annexure to the charge which carried the terms and conditions of the charge. The real intent of cl 8 of the annexure appeared to be that when the loan became payable, the plaintiff would immediately become entitled to recover and when he decided to proceed for recovery, he must exercise his rights and powers as provided in the annexure to the charge. In the present case, the land administrator is a competent tribunal under the law where the plaintiff could obtain a complete remedy, and to allow the plaintiff to file an action before another tribunal, in this case the High Court, where the earlier proceedings had not even been completed before the land administrator, must be treated as a case of abuse of the process of the court. The foreclosure action was complete upon the sale of the land and should there be a shortfall after recovery of the amount due from the sale price, cl 8 was immediately attracted in that the chargor shall make good the difference. Whether the chargor in that event would or would not comply was not in issue for the determination of what was a 'complete remedy'.

E (3) In the circumstances, the answer to the question posed before the court was in the negative and accordingly the court ordered that the present suit be stayed and that costs be in the cause.

[Bahasa Malaysia summary]

G Ini adalah suatu permohonan oleh bank plaintiff bagi keputusan mahkamah ini atas soalan-soalan berikut: 'sama ada plaintiff yang juga pemegang gadaian tanah yang dipegang di bawah HS(M) 13399 lot 3134/29 dalam mukim Kuala Kuantan ('tanah tersebut') adalah berhak di sisi undang-undang dan dalam ekuiti untuk bertindak melalui satu guaman sivil sebelum terlebih dahulu menghasilkan cagaran di bawah gadaian, dan jika sedemikian, sama ada plaintiff berhak bertindak pada masa yang sama atas segala remedinya.

H Bank plaintiff telah memberi satu pinjaman perumahan kepada defendan atas jaminan tanah tersebut yang telah digadai kepada bank plaintiff. Jumlah yang terhutang setakat 9 Mei 1986 kepada plaintiff atas kemudahan tersebut di mana satu tuntutan telah dibuat adalah \$290,873.56. Untuk menghasilkan wang yang terhutang, plaintiff memohon bagi suatu perintah jualan tanah tersebut dan pejabat tanah Kuantan telah membenarkan permohonan tetapi belum lagi menetapkan tarikh lelong. Plaintiff juga memfail satu writ saman dalam mahkamah ini menuntut jumlah yang terhutang.

I Peguam plaintiff menegaskan bahawa soalan yang ditujukan kepada mahkamah ini mesti diberi jawapan yang mengiakan bahawa kedua-kedua prosiding sekat-tebusan dan guaman sivil boleh dijalankan bersama-sama.

Diputuskan, menjawab soalan dalam negatif:

(1) Mahkamah mendapati bahawa sekiranya jumlah yang dihasilkan oleh pemegang gadaian atas jualan tanah yang digadai itu adalah kurang daripada jumlah yang terhutang kepada pemegang gadaian, penggadai mestilah membayar kepada pemegang gadaian perbezaan antara jumlah yang terhutang dan jumlah yang dihasilkan. Oleh itu, tanggungan persendirian penggadai hanyalah setakat baki jumlah yang terhutang (fasal 8). Setelah membaca lampiran gadaian pada keseluruhannya, kedua-dua pemegang gadaian dan penggadai adalah terikat dengan terma-terma dan syarat gadaian dan untuk menghasilkan jumlah yang terhutang, tanah itu mestilah dijual menurut peruntukan-peruntukan Kanun Tanah Negara 1965. Jika jumlah yang dihasilkan daripada jualan itu tidak mencukupi untuk membaya jumlah yang terhutang, maka adalah tersirat bahawa satu tindakan berasingan boleh diambil terhadap penghutang/penggadai untuk mendapat kembali baki sekiranya dia gagal membayar perbezaan itu.

(2) Tidak ada jaminan bertulis yang terlibat dalam kes ini. Satu-satunya bentuk perjanjian atau munafakat yang dijanjikan oleh kedua-dua pihak adalah lampiran kepada gadaian yang membawa terma-terma dan syarat-syarat gadaian. Niat fasal 7 yang sebenar lampiran itu nampaknya bahawa apabila pinjaman itu perlu dibayar, plaintiff akan dengan serta-mertanya berhak menerima balik dan apabila dia mengambil keputusan untuk meneruskan proses mendapat kembali pinjaman itu, dia mestilah menggunakan hal-hak dan kuasa-kuasa yang diperuntukkan dalam lampiran kepada gadaian itu. Dalam kes ini, pentadbir tanah adalah tribunal yang layak di bawah undang-undang di mana plaintiff boleh mendapat satu remedi yang sempurna, dan untuk membenarkan plaintiff memfail suatu tindakan di hadapan tribunal yang lain, dalam kes ini Mahkamah Tinggi, apabila prosiding yang terlebih dahulu belum lagi sempurna di hadapan pentadbir tanah, mestilah dianggap sebagai satu kes penyalahan proses mahkamah. Tindakan sekat-tebusan adalah sempurna atas jualan tanah itu dan sekiranya terdapat kekurangan selepas mendapat kembali jumlah yang terhutang daripada harga jualan, fasal 8 akan dengan serta-mertanya terpakai di mana penggadai mestilah membayar perbezaannya. Sama ada penggadai dalam kejadian itu akan atau tidak akan mengikutinya bukanlah isu dalam menentukan apakah satu 'remedi sempurna'.

(3) Dalam keadaan ini, jawapan kepada soalan yang ditujukan kepada mahkamah adalah negatif dan oleh itu, mahkamah mengarahkan bahawa guaman ini digantungkan dan bahawa kos adalah dalam kausa tindakan.]

[*Editorial Note*: The plaintiff's appeal to the Supreme Court vide Civil Appeal No 02-65-1991 was heard on 10 June 1991 and 11 June 1991 and the court (comprising Abdul Hamid Omar LP, Mohamed Azmi and Gunn Chit Tuan SCJJ) dismissed the appeal with costs.]

Cases referred to

- 1 *Malaysian International Merchant Bankers Bhd v G & C Securities Sdn Bhd & Anor* [1988] 2 MLJ 471 (distd)
- 2 *Malaysia Building Society Bhd v Lim Kheng Kim & Ors* [1988] 3 MLJ 175 (refd)
- 3 *Bank Bumiputra Malaysia Bhd v Doric Development Sdn Bhd & Ors* [1988] 1 MLJ 462 (refd)
- 4 *Bank Bumiputra Malaysia Bhd v Esah bte Abdul Ghani* [1986] 1 MLJ 16 (refd)
- 5 *Ng Yik Seng & Anor v Perwira Habib Bank Malaysia Bhd* [1980] 2 MLJ 83 (refd)
- 6 *Asia Commercial Finance Bhd v Sri Rendangan Sdn Bhd & Ors* (Penang High Court Civil Suit No 23-505-86) (unreported) (refd)

- 7 *Public Bank Bhd v Mohd Hassan bin Abu Bakar* (Kota Bharu High Court Civil Suit No 24-145-1986) (unreported) (refd)
- 8 *Ewart v Latta* (1865) 4 Macq 983 (refd)
- 9 *Williams v Hunt* [1905] 1 KB 512 (folld)
- 10 *Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd* [1988] 2 MLJ 184 (not folld)

B Legislation referred to

National Land Code 1965 ss 256, 260

Jaya Ramachandran for the plaintiff.
Mura Raju for the defendant.

Cur Adv Vult

C Lamin J: This is an application by the plaintiff bank for the decision of this court on the following questions:

Whether the plaintiff being also the chargee of property comprised under HS (M) 13399 lot 3134/29 in the mukim of Kuala Kuantan is entitled at law and in equity to proceed by way of a civil suit before first realizing the security under the charge and if so, whether the plaintiff is entitled to proceed concurrently on all his remedies.

D The plaintiff bank has made available banking facilities to the defendant by way of an advance as a housing loan and, for security, the same land where the purchased house stands is charged in favour of the plaintiff. That is the only form of security for the facilities provided. **E** Now the outstanding amount due as at 9 May 1986 to the plaintiff on the said facilities for which a claim is being made is \$290,873.56. (The description of the landed security is as appears in the question posed above.) To realize the money owing, the plaintiff has applied for an order for sale of the charged land and the Kuantan Land Office has granted the application but has yet to fix the date of auction. The plaintiff has also filed a writ of summons in this court claiming the amount now due.

G The undisputed facts are that the charge is the only form of security for the loan. The defendant is the borrower and is also the registered owner of the charged land. The loan was granted in October 1982. The charge was registered on 22 February 1983. The amount of loan outstanding is not in issue.

H Learned counsel for the plaintiff maintains that the question as posed to this court must be answered in the affirmative in that both the foreclosure proceedings and the civil action can be pursued concurrently and counsel for both parties cited a number of authorities.

I In the case of *Malaysian International Merchant Bankers Bhd v G & C Securities Sdn Bhd & Anor*,¹ the plaintiff on 14 December 1982 gave a loan to the first defendant company for a housing project and the company executed a charge in favour of the plaintiff bank by way of security. The same day the director of the company executed a written guarantee for the repayment on

demand of all sums owing. When the defendants could not repay the loan, a demand was made but they failed to comply. A writ of summons was first filed claiming for the sum of \$335,958.52 by way of balance of principal and interest thereon. Then a foreclosure action was taken. The learned senior assistant registrar gave summary judgment and rejected the argument on behalf of the defendant that the charge should be realized first before the suit could be proceeded with. The appeal against the senior assistant registrar's decision was dismissed.

In the case of *Malaysia Building Society Bhd v Lim Kheng Kim & Ors*,² the plaintiff gave a loan to an incorporated company. The said loan was secured by a charge over the company's land. At the same time, the defendants also stood as guarantors for the loan. It was contended on behalf of the defendants that as the plaintiff had obtained an order for sale of the borrower's land and the sale was pending, the suit was therefore a useless piece of litigation because the value of the property exceeded the judgment sum. The court held that the provisions of the guarantee as a whole were such that the plaintiff was not bound or required to realize the security before enforcing the guarantee.

In the case of *Bank Bumiputra Malaysia Bhd v Doric Development Sdn Bhd & Ors*,³ the plaintiff granted an overdraft facility to the first defendant company secured by a charge over the company's land. In addition, the third defendant signed a letter of guarantee for the repayment of the overdraft. The learned registrar granted leave to enter final judgment against them in favour of the plaintiff. The first and the third defendants appealed against the said decision but it was dismissed.

In the case of *Bank Bumiputra Malaysia Bhd v Esah bte Abdul Ghani*,⁴ the plaintiff bank lent money to the principal debtor in the sum of \$16,000 and for security, two pieces of land belonging to the principal debtor and two others were charged. The respondent stood as a guarantor for the said loan. When the loan could not be repaid, the plaintiff first took a foreclosure action on the land but before the issuance of the order of sale, one of the owners died. So foreclosure was not proceeded with. Instead, the plaintiff bank took out a writ against the principal debtor and the surety (ie the respondent). Judgment was entered against both of them. Based on the said judgment, a bankruptcy notice was issued calling on the surety to settle the amount. The surety failed to pay and a creditor's petition was filed against her. She then filed a notice of intention to oppose the creditor's petition. The learned judge stayed the petition pending the decision of the petition against the principal debtor. The plaintiff bank appealed and the Supreme Court held that the learned judge had no jurisdiction either to dismiss or to stay the creditor's petition.

A In the case of *Ng Yik Seng & Anor v Perwira Habib Bank Malaysia Bhd*,⁵ the respondent bank granted an overdraft to a company secured by a legal charge and a guarantee by four guarantors in their personal capacities (the two appellants and two other directors). However, in this case, only the guarantors were sued for the repayment of the overdraft. So the question as to whether the charge must first be realized in order to satisfy the money owing was not put squarely before the learned senior assistant registrar perhaps because either no action was taken under the charge or the guarantors (the appellants) only relied on one ground in their defence in that they denied executing the guarantee for the reason that the signatures thereon were *not* theirs. So the real question before the Federal Court in this case was whether there was a triable issue and it decided in the affirmative.

D In the case before me the only security is the legal charge and the defendant is the borrower and the chargor as well. In all the above cases, the loans or the banking facilities were secured by a charge and a written guarantee or guarantees. The guarantee is just another security independent of the charge carrying with it its own terms and conditions to bind the guarantor and failure to comply with any of them will constitute a breach which will form the basis for the issuance of a writ. It has been said that a guarantee is a mere collateral security and so is a charge. So in a case like the instant case where there is only one form of security for the loan which is the charge, it can be argued that the plaintiff is at liberty to proceed direct against the defendant who is the borrower and the debtor for the recovery of the sum due and owing. Can the plaintiff do that legally in the face of the terms and conditions of the charge as found in the annexure? For ease of discussion, I repeat below some of the relevant clauses of the annexure.

G Clause 8: If the amount realized by the chargee on a sale of the said land under the provisions of the National Land Code after deduction and payment from the proceeds of such sale of all fees dues costs rents rates taxes and other outgoings on the said land is less than the amount due to the chargee and whether at such sale the chargee is the purchaser or otherwise the chargor(s) shall pay to the chargee the difference between the amount due and the amount so realized and until payment will also pay interest on such balance at the prescribed rate as aforesaid with monthly rests.

H Clause 36: The security liabilities and or obligations created by this charge shall continue to be valid and binding for all purposes whatsoever notwithstanding any change by amalgamation reconstruction or otherwise which may be made in the constitution of the chargee or of any company by which the business of the chargee may for the time being be carried on and shall be available to the company carrying on that business for the time being.

I Clause 37: The security liabilities and or obligations created by this charge shall continue to be valid and binding

for all purposes whatsoever notwithstanding any change whether by reason of amalgamation bankruptcy death incorporation liquidation reconstruction winding-up or otherwise howsoever in the name style constitution or composition of the chargor(s) and the expression the 'chargor(s)' in this charge includes the persons for the time being deriving title under the chargor(s) and it is expressly declared that no change of any sort whatsoever in relation to or affecting the chargor(s) shall in any way affect the security liabilities and or obligations created by this charge in relation to any transaction whatsoever whether past present or future.

Clause 40: This charge shall be binding upon the heirs liquidators receivers representatives assigns and successors in title of the chargor(s) and on the successors in title and assigns of the chargee.

Clauses 36 and 37 stipulate that the security liabilities and or obligations created by the charge shall continue to be *valid and binding* for all purposes notwithstanding any change in the position, status and constitution of the chargee and chargor. By cl 40 the charge binds both the chargor and his successors in title and assigns including the heirs, liquidators, receivers and representatives. If the chargor shall make default in respect of any of the provisions in cl 6 then in any of such case the loan etc for the time being *under the charge* shall immediately become payable and the chargee shall forthwith be entitled to recover the same 'and to exercise the rights and powers upon default *herein this charge*'. If the amount realized by the chargee on the sale of the charged land is less than the amount due to the chargee, the chargor shall pay to the chargee the difference between the amount due and the amount so realized. So the personal liability of the chargor is only to the extent of the balance of the amount due (cl 8). It is quite clear that upon reading the annexure as a whole both the chargee and the chargor are bound by the terms and conditions of the charge and to realize the amount owing, the land must be sold in accordance with the provisions of the National Land Code 1965 ('NLC'). If the amount realized from the sale is not sufficient to cover the amount due then it is implied that a separate action may be taken against the debtor/chargor to recover the balance should he fail to pay the chargee the difference.

In the cases cited above where the loan was secured by two collateral securities, namely, a charge and a guarantee, our courts generally have taken the view that it is not required to realize the security under the charge before enforcing the guarantee. However, it appears that their view has been adopted because they have been influenced by the provisions of the guarantee. In *Malaysian International Merchant Bankers Bhd v G & C Securities Sdn Bhd & Anor*,¹ Shankar J has this to say at p 472:

So far as the second defendant was concerned cl 3 of the guarantee provided that all moneys due from the company could nevertheless be recoverable from him as principal

A debtor, and cl 4 provided that the guarantee was in addition to and not in substitution for any other rights which the bank may have had under the charge. Clearly therefore it was open to the bank to proceed simultaneously against the second defendant as well.

In *Malaysia Building Society Bhd v Lim Kheng Kim & Ors*,² we find cl 5 of the guarantee carrying a somewhat similar intent as cl 4 in the *Malaysian International Merchant Bankers* case.¹ Edgar Joseph Jr J in the *Malaysia Building Society* case² found further support in cl 3 of the guarantee and he had this to say (at p 183):

C As if to put the matter beyond doubt, the last sentence of cl 5 provides that 'the society shall not be bound or required to proceed against the security first before enforcing this guarantee against the guarantors'. [Clause 5 as stated in the report should read as cl 3 — Ed.]

D In the case of *Asia Commercial Finance Bhd v Sri Rendangan Sdn Bhd & Ors*,⁶ though the loan was secured by a charge and a guarantee, the court decided that the claim against the first defendant (the registered proprietor of the land and the chargor) was premature in view of the reading of cl 7 of the annexure to the charge. (Note: Clause 7 is in *pari materia* with cl 8 in the case before me.) The agreement was that the personal liability of the chargor was in respect of the difference and that difference being the balance to be paid by the chargor could only be ascertained after the land has been sold. The second defendant in this case was the borrower while the third and fourth defendants were the guarantors. The plaintiffs had already applied for an order of sale of the said land. But in the civil action, the first defendant (owner of the land) applied for the action against them to be struck out on the ground that the action was premature because the land had not been sold. Unfortunately, there was no discussion on the provisions of the guarantee.

G In another unreported case but before the Kota Bharu High Court in the case of *Public Bank Bhd v Mohd Hassan bin Abu Bakar*⁷ where the defendant obtained a housing loan from the plaintiff bank secured by a charge on the defendant's land; upon default in payment, the plaintiff filed a suit. After the defence had been filed, the plaintiff filed a summons-in-chambers for an order that the statement of defence be struck out as it disclosed no reasonable defence and was vexatious and an abuse of the process of the court, and that the plaintiff be at liberty to enter final judgment. About a month afterwards, the defendant filed a summons-in-chambers for an order that the action and all pending applications be stayed on the ground that he had been ordered by the Collector of Land Revenue, Kota Bharu to pay the amount due and owing failing which the property would be sold. In view of this, the defendant said that the plaintiff could always proceed against him in court for the balance in the event that the proceeds of the sale was insufficient to cover the loan and the inter-

est. The court dismissed the defendant's application for a stay of the proceedings as the learned judge was of the view that the plaintiff had the discretion to sue in any manner for the sum due. A number of authorities were cited before him and he appeared to have placed reliance in particular on *Bank Bumiputra Malaysia v Esah*⁴ and *Ewart v Latta*.⁸ In this unreported case, no reference was made to the terms and conditions of the charge as normally found in the annexure so that we are deprived of the learned judge's view on them.

Even cl 8 of the annexure to the charge in the present case cannot override the provisions of a guarantee if there were any in the case before me similar to those found in the two cases cited above, namely, the cases of *Malaysia Building Society*² and *Malaysian International Merchant Bankers*.¹ I entirely agree with the learned judge in the *Malaysian International Merchant Bankers* case¹ on the effect of s 11.03 of the charge (s 11.03 is similarly worded as cl 8 of the annexure in the present case.) But there is no written guarantee involved in the case before me. The only form of agreement or covenant agreed to by both the plaintiff (the chargee) and the defendant (the chargor) is the annexure to the charge which carries the terms and conditions of the charge. In the event the chargor makes default, the loan for the time being owing 'shall immediately become payable' and the chargee 'shall forthwith become entitled to recover the same' and 'to exercise the rights and powers upon default herein *this charge*' (cl 6). The real intent of this provision appears to be that when the loan becomes payable, of course the plaintiff will immediately become entitled to recover and when he decides to proceed for recovery, he must exercise his rights and powers as provided in the annexure to the charge. I am unable to read into it otherwise and all the more so with the operation of cll 36, 37 and 40. The annexure must be given effect to.

I am further fortified by the proposition enunciated in the case of *Williams v Hunt*⁹ and in the words of Collins MR (at p 514):

Where two separate remedies are possible, and a start is made by putting in force of those remedies by a writ which would entitle the plaintiff to the relief he subsequently desires, he cannot by deliberately leaving that out of his claim reserve his right to ask for it in another proceeding. Where proceedings have been started, it is an abuse of the process of the court to divide the remedy where there is a complete remedy in the court in which the suit was first started.

In that case, the facts were that the defendant was a lessee of certain premises which he mortgaged by deed of 28 March 1901, to the plaintiff as security for a loan of £400. The mortgaged deed contained a provision for the repayment of the principal by quarterly instalments. In May 1924 an action was commenced by writ issued in the Chancery Division by the plaintiff as mortgagee.

A Before the case was heard, the plaintiff issued a specially indorsed writ in the King's Bench Division by which she claimed 416l 17s 2d for principal and interest. Then the defendant applied for a stay of the proceedings in the King's Bench Division on the ground that the whole cause of action was the subject of the action pending in the Chancery Division. So it was decided that it was an abuse of the process of the court to allow the proceeding before the King's Bench Division when a complete remedy could be obtained in the Chancery Division. Certainly this was good policy as this could help to discourage litigants from knocking at the door of every court when the process in the first court had not been completed. In the case before me, the foreclosure proceedings were before the Land Administrator as it was a Land Office title that was the subject matter of the proceedings (s 260 NLC). Under the NLC, if the subject matter of the foreclosure is a registry title, then the High Court will be the tribunal that will dispose of the application for the foreclosure action (s 256 NLC). In our case, the Land Administrator is a competent tribunal under the law where the plaintiff bank can obtain a complete remedy, and to allow the plaintiff to file an action before another tribunal, in this case, the High Court, where the earlier proceeding has not even been completed before the Land Administrator, must, to my mind, be also treated as a case of an abuse of the process of the court. The foreclosure action is complete upon the sale of the land and should there be a shortfall after recovery of the amount due from the sale price, cl 8 is immediately attracted in that the chargor 'shall' make good the difference. Whether the chargor in that event will or will not comply is not in issue for the determination of what is a 'complete remedy'. Just as in *Williams v Hunt*,⁹ compliance with the personal order for payment of what was found due was not the concern of the court.

G The case of *Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd*¹⁰ was also cited before me. Unlike in the instant case, two forms of collateral securities were involved in the *Lesco* case,¹⁰ namely, by a guarantee and a charge but each was being dealt with in a different division of the High Court, Kuala Lumpur. The suit questioning the guarantee was filed first in the Commercial Division. Four days later while an application to set aside the default judgment was still pending in the first court a foreclosure action was filed in the Family and Property Division. (It was a registry title). Anyway, on appeal, the Supreme Court decided that the foreclosure proceedings should have been postponed until final disposal of the suit because there was already a default judgment against the appellant earlier in the civil action and that it was 'undesirable' to allow a situation where two different courts would try and determine the same issues. With respect, I think *Lesco's* case¹⁰ strictly has no application in the case before me.

In the circumstances, my answer to the question posed before me is in the negative, and accordingly I order that the present suit be stayed and that costs be in the cause.

Action stayed.

Solicitors: *Balendran Chong Haranay & Bodi; Mura Raju & Co.*

Reported by *Eunice Lee*

Ward Iwn Malaysian Airline System Bhd

MAHKAMAH TINGGI (KUALA LUMPUR) — GUAMAN SIVIL
NO P 165-1984
WAN MOHAMED H
26 DISEMBER 1990

Gantirugi (Kecelakaan Diri atau Kematian) — Insuran kecederaan — Wang insuran diterima — Dipotong daripada jumlah gantirugi — Akta Undang-Undang Sivil 1956, s 28A(1)(a)

Plaintif ialah seorang juruterbang pesawat bertugas di kawasan Sabah dan Sarawak. Defendan adalah majikan plaintif. Pada masa plaintif menjalankan tugasnya pada 6 Julai 1982 kapal terbang yang dipandu olehnya telah mengalami kerosakan mesin dan terpaksa membuat pendaratan kecemasan dekat Lawas, Sarawak. Pihak plaintif telah mengatakan bahawa pihak defendan telah cuai dan menyebabkan enjin pesawat itu rosak dan beliau terpaksa membuat pendaratan kecemasan. Plaintif telah cedera akibat kemalangan itu. Pihak defendan telah mengaku 100% liabiliti. Mahkamah dikehendaki memutuskan jumlah gantirugi am dan khas yang perlu diberi kepada plaintif. Ada dua insuran yang diambil dan dibayar premium oleh pihak defendan untuk (1) kecederaan ke atas plaintif \$300,000 dan (ii) kehilangan lesen juruterbang \$300,000. Wang tersebut telah dibayar kepada plaintif oleh defendan.

Diputuskan, memberikan gantirugi seperti berikut:

(1) Gantirugi khas untuk perbelanjaan mendapat pemeriksaan dan laporan doktor ditetapkan sebagai \$1,250.

(2) Untuk kehilangan pendapatan sebelum perbicaraan, mahkamah telah memberikan gaji penuh \$4,000 sebulan bagi tempoh dari Ogos 1983 hingga Julai 1985 (24 bulan) sebanyak \$96,000. (Gaji penuh telah diterima oleh plaintif dari Julai 1982, tarikh kemalangan, hingga Julai 1983.) Bagi tempoh Ogos 1985 hingga Februari 1990, tarikh perbicaraan, mahkamah telah memberikan \$2,000 sebulan untuk 55 bulan, jumlahnya \$110,000.

(3) Untuk kehilangan pendapatan selepas perbicaraan, mahkamah telah memberikan \$2,000 sebulan selama satu tahun lima bulan, jumlahnya \$34,000.

(4) Untuk kesakitan dan penderitaan akibat kecederaan di kepala, kecacatan pemikiran dan retak pada tulang bahu, mahkamah memberikan \$60,000.

(5) Jumlah gantirugi yang diberikan ialah \$301,250. Oleh kerana plaintif telah menerima \$300,000 daripada defendan, iaitu hasil atau terbitan daripada insuran kemalangan diri (personal accident insurance) yang diambil dan dibayar premiumnya oleh defendan, dan telah diputuskan oleh mahka-

A mah jumlah wang tersebut boleh dipotong daripada jumlah gantirugi yang ditaksirkan di atas, maka bakinya yang perlu dibayar oleh defendan ialah \$1,250 (iaitu sebagai gantirugi khas) dan mahkamah mengenakan faedah sebanyak 4% dari tarikh kemalangan hingga tarikh keputusan ini dibuat dan 8% dari tarikh keputusan hingga tarikh pembayaran.

[English summary]

B The plaintiff was a pilot employed by the defendants and he operated in Sabah and Sarawak. While on duty on 6 July 1982, the aircraft piloted by him, developed engine trouble and he was forced to make an emergency landing near Lawas, Sarawak. The plaintiff claimed that the defendants were negligent and this caused the aircraft to develop the engine trouble and he had to make the emergency landing. The plaintiff was injured in the emergency landing. The defendants admitted 100% liability. The court was asked to assess the damages, general and special, payable to the plaintiff. The defendants had taken out and paid for insurance for (a) injury to the plaintiff \$300,000 and (b) loss of pilot's licence \$300,000. The money from the insurance had been received and paid to the plaintiff.

D Held, awarding damages as follows:

(1) Special damages for expenses for medical examination and report was fixed at \$1,250.

(2) For loss of earnings before trial, the court allowed full salary of \$4,000 a month for the period from August 1983 to July 1985 (24 months) which amounted to \$96,000. (Full salary had been received by the plaintiff from July 1982, the date of the accident, to July 1983.) For the period from August 1985 to February 1990, the date of trial, the court awarded \$2,000 a month for 55 months which amounted to \$110,000.

(3) For post-trial loss of earnings, the court awarded \$2,000 for one year five months which amounted to \$34,000.

F (4) For pain and suffering due to the head injury, loss of memory and fracture to the shoulder bone, the court awarded \$60,000.

(5) The total amount of damages awarded was \$301,250. As the plaintiff had received a total of \$300,000 from the defendants, from the insurance policies which were taken out and the premiums paid for by the defendants, that sum should be deducted from the total damages awarded, leaving a sum of \$1,250 to be paid by the defendants to the plaintiff.]

Kes-kes rujukan

- 1 *Chan Kam Lan v Ong Lean Kee* [1979] 1 MLJ xxxviii (dirujuk)
- 2 *K Ratnasingam v Kow Ah Dek & Anor* [1983] 2 MLJ 297 (dirujuk)
- 3 *Zamri bin Omar v Idris bin Mohd Nor* [1989] 2 CLJ 267 (dirujuk)
- 4 *Goh Chin Tee v Lau Chun Leung* [1985] 2 MLJ cxcii (dirujuk)
- 5 *Tominam bte Tukimin v Toh Kai Chup* [1985] 2 MLJ 345 (dirujuk)
- 6 *Kow Ah Dek & Anor v K Ratnasingam* [1981] 2 MLJ 24 (dirujuk)
- 7 *Ahmad Nordin bin Haji Mazlan & Anor v Eng Ngak Hua & Ors* [1985] 2 MLJ 431 (diikut)
- 8 *Mohamed Yassin bin Isa & Ors v MCW Express Sdn Bhd & Ors* [1988] 1 CLJ 821 (diikut)
- 9 *Chaplin v Boys* [1971] AC 356 (dirujuk)
- 10 *Ngooi Ku Siong v Aidi Abdullah* [1985] 1 MLJ 30 (dirujuk)